

STATE OF TENNESSEE

Office of the Attorney General



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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
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June 24, 2003

Honorable Sara Kyle
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

**RE: Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein In RE: Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges So As to Permit it to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Water Service to Its Customers
Docket No. 03-00118**

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein in the above noted docket. Kindly file same in this docket. We are forwarding copies of same to all parties of record. If you have any questions, please feel free to contact me at (615) 532-3382. Thank you.

Sincerely,

VANCE BROEMEL
Assistant Attorney General

Enclosures

cc: All Parties of Record

65664

IN RE:

**PETITION OF TENNESSEE AMERICAN
WATER COMPANY TO CHANGE AND
INCREASE CERTAIN RATES AND
CHARGES SO AS TO PERMIT IT TO EARN A
FAIR AND ADEQUATE RATE OF RETURN
ON ITS PROPERTY USED AND USEFUL IN
FURNISHING WATER SERVICE TO ITS
CUSTOMERS**

DOCKET NO. 03-00118

Comes Paul G. Summers, the Attorney General & Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter “Attorney General”) and hereby moves for an order striking and excluding the proposed testimony of Chris Klein offered by Tennessee American Water Company (“Tennessee American”). As grounds for this motion the Attorney General would state that the name of Chris Klein and the nature of his testimony were never disclosed to the Attorney General despite a discovery request for such information which has been pending since April 30, 2003. Thus, the testimony of Chris Klein is a violation of Tennessee American’s obligation to timely file discovery responses and the use of this testimony would deprive the Attorney General and the thousands of Chattanooga-area consumers who are facing a multi-million dollar rate increase of the right to a fair hearing because the Attorney General has not had adequate time to investigate and prepare for this witness.

ARGUMENT

In Discovery Request No. 1 of its Second Discovery Request to Tennessee American filed April 30, 2003, the Attorney General specifically asked for the name, background and nature of the testimony for each expert witness to be called by Tennessee American:

DISCOVERY REQUEST NO.1:

Identify each person whom you expect to call as an expert witness at any hearing in this docket, and for each such expert witness:

- (a) identify the field in which the witness is to be offered as an expert;
- (b) provide complete background information, including the expert's current employer as well as his or her educational, professional and employment history, and qualifications within the field in which the witness is expected to testify, and identify all publications written or presentations presented in whole or in part by the witness;
- (c) provide the grounds (including without limitation any factual bases) for the opinions to which the witness is expected to testify, and provide a summary of the grounds for each such opinion;
- (d) identify any matter in which the expert has testified (through deposition or otherwise) by specifying the name, docket number and forum of each case, the dates of the prior testimony and the subject of the prior testimony, and identify the transcripts of any such testimony;
- (e) identify for each such expert, any person whom the expert consulted or otherwise communicated with in connection with his expected testimony;
- (f) identify the terms of the retention or engagement of each expert including but not limited to the terms of any retention or engagement letters or agreements relating to his/her engagement, testimony and opinions;
- (g) identify all documents or things shown to, delivered to, received from, relied upon, or prepared by any expert witness, which are

related to the witness(es)' expected testimony, including without limitation all documents or things provided to that expert for review in connection with testimony and opinions; and

- (h) identify any exhibits to be used as a summary of or support for the testimony or opinions provided by the expert.

Tennessee American's response to this request was as follows:

Mr. James E. Salser, will address federal income tax and the Company's requested Distribution System Renewal Surcharge ("DSR"). However, the Company may wish to introduce additional witnesses to rebut specific issues raised by interveners in their direct testimonies.

- (b) Each of the witnesses identified above have filed direct testimony in this proceeding and identified publications written in whole or in part.
- (c) The information requested has been addressed in the direct testimonies of the Company's expert witnesses listed above in response to item 1 (a).
- (d) Attached to Mr. Herbert's Direct Testimony is a complete list of cases, including docket numbers. Mr. Paul Moul has testified in over 200 rate cases at the state and federal level as shown on Appendix A attached to his Direct Testimony. (Also, Included on Appendix A are the areas addressed.) Attached are docket numbers for the last 14 years. Dr. Spitznagel has identified his consulting experience on Appendix A attached to his direct testimony. However, the docket numbers are not shown. We have requested the docket numbers from Dr. Spitznagel but he is out of the office this week. We will provide the document numbers as soon as received.
- (e) The Company's experts have communicated directly with and requested information through Roy L. Ferrell, Director of Rates and Planning of the Southeast region Service Company.
- (f) In each instance, the agreements are oral based on the stated hourly rates shown below:
Paul Moul \$175 hour
Paul Herbert \$145 hour

Dr. Spitznagel \$10,000 (not including attending hearing)
Jim Salser \$90 hour

A ceiling for our estimates have been included as part of the Company's requested rate case expense or its cost of service study.

- (g) Information provided by the Company is attached and separately identified for all witnesses with the exception of Jim Salser. Mr. Salser is provided a conference room at the Southeast Region's office while working on his assignments. Information is supplied to him based on his requirements.
- (h) Exhibits supporting testimony or opinions were attached to the Direct Testimonies.

The name of Chris Klein was not mentioned anywhere in the response.

Tennessee American propounded similar expert interrogatories to the Attorney General. Although the Attorney General objected to these interrogatories as premature because pre-filed expert testimony was not yet completed, it responded as fully as possible and, in particular, disclosed the names of its expert witnesses and the areas of their testimony. The Hearing Officer in this case later held that information related to experts should be provided before filing expert testimony:

Request No. 2 relates to such facts and opinions as well as to the identity of the expert, the subject matter on which the expert will testify, the substance of the facts and opinions contained in the expected testimony, and a summary of the grounds for the expert's opinions. Moreover, the Pre-Hearing Officer agrees with TAWC that obtaining this information through TAWC's requests is the most efficient manner with which to proceed.

Order Granting Motions in Part and Denying in Part, April 25, 2003 (footnotes omitted)
(emphasis added).

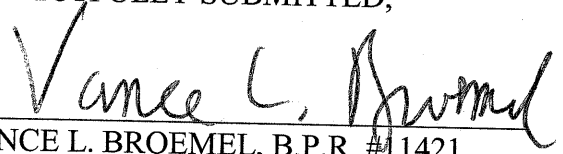
The Attorney General is required to provide responses to expert interrogatories before pre-filed testimony. It is only fair that the same rules regarding expert testimony be applied to Tennessee American.

The failure to timely provide responses to expert interrogatories prevents the Attorney General from properly preparing for this case. This case is on an extremely tight procedural schedule with a hearing date set for June 30, 2003. Already, Tennessee American has turned the procedural schedule on its head and served 34 interrogatories on the Attorney General after the time for such discovery had passed. The Hearing Officer, however, ordered the Attorney General to respond to each and every one of the interrogatories. Order Granting in Part Motion for Leave to Propound Additional Interrogatories on Intervener Consumer Advocate and Protection Division of the Office of the Attorney General and Amending Procedural Schedule, June 12, 2003 at page 4. The responses to these untimely interrogatories took valuable time away from the Attorney General's preparation. Now the Attorney General is faced with a surprise witness who was not disclosed in responses to interrogatories even though the Hearing Officer explicitly held that "[a]ll parties shall timely supplement their discovery responses as information becomes available." Order Granting Motion to Compel in Part and Denying in Part, April 25, 2003 at page 12. This surprise witness undermines the ability of the Attorney General to properly prepare for the hearing and denies the Attorney General the right to a fair hearing.

As a former employee of the TRA, Chris Klein is well known to many of the directors and staff of the TRA which potentially enhances the effectiveness of his testimony. Thus, a full investigation into his testimony, and any prior testimony or papers on similar topics, is particularly necessary. Given the tight schedule of the hearing and the lack of full disclosure by Tennessee American, such investigation and preparation is now impossible. Accordingly, the proposed testimony of Chris Klein should be struck and excluded. Strickland v. Strickland, 618 S.W.2d 496 (Tenn. Ct. App. 1981); Pegram v. Bridges, 1994 WL 592101 at page 1 (Tenn. Ct. App. 1994) (upholding exclusion of expert witness who was not disclosed despite recovery

requests) (copy attached).

RESPECTFULLY SUBMITTED,

A handwritten signature in dark ink, appearing to read "Vance L. Broemel", is written over a horizontal line.

VANCE L. BROEMEL, B.P.R. #11421

Assistant Attorney General

Office of the Attorney General

Consumer Advocate and Protection Division

(615) 741-8733

SHILINA B. CHATTERJEE, B.P.R. #20689

Assistant Attorney General

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Nashville, Tennessee 37202

(615) 532-3382

Dated: June 24, 2003

CERTIFICATE OF SERVICE

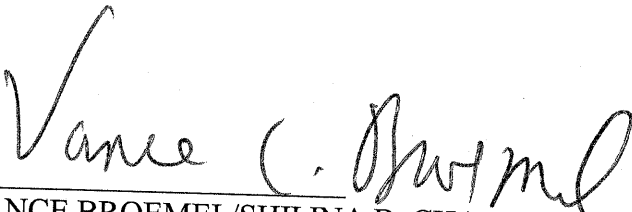
I hereby certify that a true and exact copy of the foregoing has been forwarded by facsimile and/or first-class mail, postage prepaid, to the following:

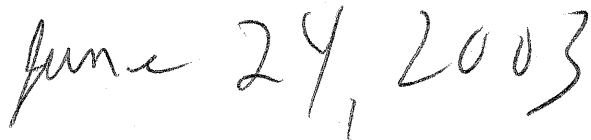
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VANCE BROEMEL/SHILINA B. CHATTERJEE
Assistant Attorney General



65872

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Terry K. PEGRAM, Jr., by next friend, Judy
PEGRAM, Plaintiff/Appellant

v.

David BRIDGES, M.D., Defendant/Appellee.

Oct. 26, 1994.

Davidson Circuit, No. 01A01-9401-CV-00013.

Helen Loftin Cornell, Nashville, for appellant.

Daniel Berexa, Nashville, for appellee.

OPINION

WILLIAM H. INMAN, Senior Judge.

I

*1 The jury returned a verdict for the defendant in this malpractice action involving an eleven-months infant who swallowed a foreign object. The issues presented for review are:

I. Whether the trial court erred in submitting Plaintiff's exhibit to the jury *after* the defendant held the marked exhibit in his possession overnight.

II. Whether the credibility of the Defendant is at issue and whether his testimony is contradicted by real evidence.

III. Whether the exclusion of Plaintiff's expert witness and the exclusion of Plaintiff's exhibits was prejudicial error.

IV. Whether the court erred in conducting trial under intemperate courtroom conditions.

V. Whether the verdict is contrary to the weight of evidence; and whether the trial court erred in denying Plaintiff's Motion for New Trial and Plaintiff's Motion for Judgment in Accordance with Plaintiff's Motion for Directed Verdict.

II

Terry Pegram was choking on an object and his mother rushed him to a local fire station, where first aid was administered successfully. He was then taken to the emergency room at West Side Hospital and examined by Dr. Bridges, who was made aware that

Terry had swallowed a foreign object. He examined Terry's mouth with an otoscope, and determined that there was no obstruction and that his vital signs were normal. An x-ray examination revealed a round, symmetrical object in his stomach, probably a ball of rolled-up paper, which in course was passed as predicted. Terry was teething, and thus was uncomfortable and drooling.

Terry was fretting the following morning, and he was taken to his pediatrician, Dr. Bishop, who discovered a metallic object in his mouth, lodged between the gums and the cheek. This object was removed, and Terry suffered no ill effects.

III

This action was filed on behalf of Terry by his mother, who alleged that Dr. Bridges failed to comply with the applicable standard of care. Testifying for the plaintiff was Dr. Bishop, who stated that the standard of care for emergency room medicine required a careful examination of Terry's mouth while he was prone and restrained and that Terry suffered no injury, temporary or permanent. Recovery of medical expenses was not sought.

Parenthetically, at this juncture, we observe that in view of the expert testimony respecting injury, the plaintiff at best could have recovered only nominal damages. The indignation felt by Terry's mother cannot be the basis of damages.

IV

A photocopy of the Emergency Room records was made an exhibit, which was inadvertently mingled with Dr. Bridges' personal documents and left in his automobile overnight. The appellant argues that Dr. Bridges thus had the opportunity to alter this photocopy to his advantage--not that he did so, but that he had the opportunity, which taints the evidentiary nature of the exhibit to the prejudice of the plaintiff. This issue is frivolous.

V

The appellant next complains that the trial court erred in excluding the testimony of Dr. Margrette Johnston, who had performed some tests on Terry. The **exclusion** was based on the **non-disclosure** of Dr. Johnston until three days before trial, notwithstanding discovery requests were served more than one year before trial. A resolution of the defendant's objection was largely

(Cite as: 1994 WL 592101, *1 (Tenn.Ct.App.))

within the discretion of the trial judge, and thus undisturbable on appeal unless an abuse of discretion is shown. *Strickland v. Strickland*, 618 S.W.2d 496 (TennApp1981). We find no abuse of discretion.

VII

*2 The appellant complains that the courtroom was hot, which doubtless impelled the jury to conclude its deliberations quickly. This issue is without merit.

VIII

Finally, the appellant argues that the verdict is contrary to the weight of the evidence. This is not a justiciable issue on appeal and is beyond our reach. *Cary v. Arrowsmith*, 777 S.W.2d 8 (TennApp1989); Tenn.R.App.P. Rule 13(d) succinctly provides that "findings of fact by a jury in civil actions shall be set

aside only if there is no material evidence to support the verdict." Once the verdict is approved by the judge, appellate review is limited to a consideration of whether there is material evidence to support it. *Poole v. Kroger Co.*, 604 S.W.2d 52 (Tenn.1980). We cannot find that there is no material evidence to support the verdict.

The appellee's motion that we find this appeal frivolous is denied.

Affirmed, with costs assessed to the appellant, and remanded.

TODD, P.J., and CANTRELL, J., concur.

1994 WL 592101 (Tenn.Ct.App.)

END OF DOCUMENT